IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 540 of 1992
And
Civil Application No.2561 of 1994
And
Civil Application No.10001 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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VANUBHAI MANGALBHAI PATEL

Versus

KHALPABHAI MANGALBHAI PATEL

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Appearance:
Mr.Anjaria for
MR SN SHELAT for appellants
Mr.Asim Pandya for
MR VIJAY H PATEL for Respondents

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CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 17/02/2000

ORAL JUDGEMENT

1. This Appeal is filed by the defendants against the judgment and decree dt.26.4.91 passed by Civil Judge (S.D.), Valsad whereby the plaintiff's suit was decreed with costs and it was declared that the plaintiff is the joint owner and occupant of the suit properties alongwith the defendants and is entitled to joint possession and joint user of the same. The defendants were permanently restrained from obstructing the plaintiff in cultivation, using the suit properties jointly with them and other family members.

2. The plaintiff and defendants No.1 and 2 are brothers and defendant No.3 is the mother of the plaintiff and defendants Nos.1 and 2 and she is residing with defendants Nos.1 and 2. The father of the plaintiff and defendants Nos.1 and 2 and the husband of defendant No.3 had died on 24.7.77.

3. The present suit was filed on 1.3.82 by the plaintiff who came with the case that the grandfather of plaintiff and defendants Nos.1 and 2 Koyabhai had died about 30 years prior to the institution of the suit, the suit lands had been purchased by his (plaintiff's) father Mangalbhai under S.32-G of the Bombay Tenancy and Agricultural Lands Act, that there was a Farm house in the land bearing S.No.285/2 since the time of grandfather Koyabhai and that it was repaired before 28 to 29 years. That at present the plaintiff was staying in the house standing on the land bearing S.No.285/2. The suit properties were in the name of deceased father Mangalbhai and at present they are jointly in the names of all parties to the Suit as also the 4 sisters (daughters of deceased Mangalbhai) at the time of institution of the suit in the Government record. On the date of filing of the suit, the defendants were cultivating the land and were residing in the house standing on the land bearing S.No.285/2. According to plaintiff, the suit properties were joint Hindu family properties and as a member of the joint Hindu family he was the joint owner and joint occupant of the suit properties, but defendants were obstructing him from entering the suit land and were also obstructing him from cultivating the suit land jointly with them. Such obstruction was made in the year 1980 and the plaintiff therefore filed the present suit seeking a declaration to the effect that the parties to the suit are joint owners and occupants of the suit land and that he was entitled to manage, occupy and cultivate the suit properties jointly with the defendants. The plaintiff also claims a permanent injunction seeking to restrain the defendants from obstructing him in cultivating and managing the suit properties jointly with

the defendants and that the defendants may also be restrained from constructing any RCC building on the land bearing S.No.285/2.

4. The claim of the plaintiff was denied through written statement Exh.42 on all material averments and it was inter alia submitted that the Suit was not maintainable and that there was no cause of action for filing the present suit.The right of the plaintiff to file the present suit was also denied and it was submitted that he was not entitled to any of the reliefs prayed for. The plea was also taken that the Suit was time barred and also that it was bad for non joinder of necessary parties i.e. the sisters. Objection was also taken that some dispute had arisen in the year 1970 between the parties in respect of the suit land and at that time the plaintiff had separated himself from the defendants and their father Mangalbhai and they had partitioned their movable and immovable properties amongst them. The defendants occupied the suit properties and one part of the Farm house was given to the plaintiff in that partition. Thus, according to the defendants, they are the sole owners and occupants of the suit lands after the death of Mangalbhai and the plaintiff has no right, title or interest therein. On these pleadings, the suit was sought to be dismissed.

5. On the basis of the pleading of the parties, the following issues were struck by the trial Court:-

"(1) Whether the plff proves that he is the joint owner of the suit properties as alleged?
(2) Whether plff proves that he is entitled to joint possession of the suit properties along with the defts as alleged?
(3) Whether plff proves that defts are not entitled to construct a house in S.No.285/2 as alleged?
(4) Whether defts prove that suit of the plff is time barred?
(5) Whether defts prove that they have become the sole owners in the suit property and the house in S.No.285/2 as alleged?
(5-A) Whether the defts prove that the suit is bad for the nonjoinder of necessary parties?
(6) Whether plff is entitled to the reliefs claimed?
(7) What order and decree?"

4. The findings on the above stated issues as recorded by the trial court were as under:-
"(1) In the affirmative.
(2) In the affirmative.

(3) In the negative.
(4) In the negative.
(5) In the negative.
(5-A) In the negative.
(6) As per final order.
(7) As per final order."

6. The plaintiff examined himself at Exh.51 and a neighbour Nanubhai Ukabhai at Exh.79.The plaintiff also produced and proved the Village Form Nos.7/12 in respect of the suit lands and the Certificate of Talati cum Mantri of Koparli Gram Panchayat certifying that house No.133 of Koparli Gram Panchayat was in the name of the plaintiff. On behalf of defendants, defendant No.1 was examined at Exh.83 and one Shri Ramjibhai Chhaganbhai at Exh.100. The copy of the judgment delivered on 28.2.85 in Appeal No.3/75 by the District Court against the judgment and decree passed in Regular Civil Suit No.115/72 by the Civil Court was also produced. It may be clarified that Regular Civil Suit No.115/72 had been filed by the father of the plaintiff and was continued by his legal representative including the present defendants. It had been pointed out by Mr. Pandya that the Suit as was filed by the father was in respect of certain other properties i.e. S.No.295, 294 and 204, which, according to him, had been transferred to the plaintiff by his father. However, that transfer was sought to be set aside through the aforesaid Suit, which was decreed against the present respondent - plaintiff and that judgment and decree has attained finality against the present respondent plaintiff as per the judgment and decree dt.28.2.85 passed by the District Court in Appeal No.3/75. Mr.Pandya has submitted that the result of that Suit has nothing to do with the present controversy and even if the decision had gone against the respondent - plaintiff in that suit No.115/72, their property also continues to be the property of joint Hindu family of which he was a member and continues to be a member as such.

7. On behalf of the appellants-defendants, the decree, as has been passed, has been contested mainly on the ground that the partition had already taken place and whereas the plaintiff-respondent had himself admitted in his evidence that he was living separately, it was sufficient to constitute a case of partition of the properties and that the plaintiff could no more claim a declaration as was sought in the plaint that he continues to be the joint owner and joint user of the properties in question. In other words, what is sought to be argued is that whereas the prayer in the Suit is not coupled with

the prayer for partition and the plaintiff by his conduct of living separately had made his intention manifest to severe his status as a joint owner, he stood deprived of claiming any joint ownership and, therefore, the Suit should have been dismissed. In support of this case, Mr.Anjaria has placed reliance on a decision of the Supreme Court in the case of Raghavamma v. Chenchamma, reported in AIR 1964 SC 136. Reliance has been placed on the observations made in para 28 at page 148 wherein the Supreme Court has observed that law is well settled that a severance in estate is a matter of individual discretion and that to bring about that state there should be an unambiguous declaration to that effect, are the propositions laid down by the Hindu law texts and sanctioned by authoritative decisions of Courts. But the difficult question is whether the knowledge of such a manifested intention on the part of the other affected members of the family is a necessary condition for constituting a division in status. Therefore, a member of a joint Hindu family seeking to separate himself from other will have to make known his intention to the other members of the family from whom he seeks to separate. The process of manifestation may vary with circumstances. While considering the question of separation the following proposition has also been quoted:-

"A member of a joint Hindu family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declaration of a fixed intention to become separate."

Mr.Anjaria has also cited the decision of the Supreme Court in the case of Girijanandini v. Bijendra Narain, reported in AIR 1967 SC 1124. In para 7 of this report, to which a pointed reference was made by Mr.Anjaria, the Supreme Court has observed that partition may ordinarily be effected by institution of a suit, but submitting the dispute as to division of the properties to arbitrators, by a demand for a share in the properties, or by conduct which evinces an intention to sever the joint family; it may also be effected by agreement to divide the property. But in each case the conduct must evidence unequivocal intention to sever the joint family status.

It is, therefore, clear from both these decisions also that the factum of living separately does not mean and cannot be taken to mean that the partition has taken place. If a member of the Joint Hindu Family has started living separately, it can at the most mean that he intends to be separate but on that basis it cannot be

held that the actual partition had taken place. Intention to seek a partition is only a step so as to claim the actual partition of the property, but such intention does not and cannot be taken to mean that moment the member of the Hindu joint family starts living separately, he stands to loose his rights in the property of the joint Hindu family. There may be more than one reasons for which the person may have to live separately and one such reason, which has been suggested in the instant case, is that the plaintiff was working as a Teacher and he was living separately since 1957 or 1958. But such conduct on the part of a member of joint Hindu family to live separately does not deprive him of his right in the property as a member of the joint Hindu family. In the Supreme Court decision in the case of Girijanandini v. Bijendra (Supra) in para 7 the Supreme Court has observed that,

"Merely because one member of a family severs his relation, there is no presumption that there is severance between the other members; the question whether there is severance between the other members is one of fact to be determined on a review of all the attendant circumstances."

8. Therefore, this Court finds that the plaintiff, even if he had started living separately, did not stand deprived of his status as such and it could not mean that his right as a member of the joint Hindu family had extinguished and that he was not entitled to claim declaration that he was the joint owner and occupant of the suit properties alongwith the defendants unless a partition had in fact taken place.

9. Mr.Anjaria then submitted that in the written statement a plea had been taken that the partition had already taken place in the year 1970. However, no material or evidence has been led to prove the factum of actual partition. Neither there is any document nor any other evidence of contemporaneous nature to support the factum of actual partition. Member of a joint family may separate but that separate living has nothing to do and had no direct relationship with regard to the share in the property or the claim of such member in the joint family property as its member.

10. It was also argued by Mr. Anjaria on behalf of the appellants that no specific issue was struck by the trial court on the question as to whether the partition had taken place or not in the year 1970, although a plea to this effect had been specifically raised in the written statement and, therefore,he submitted that the

matter may be remanded back. In this regard, it may be straightaway pointed out in the first instance that the present appellants - defendants themselves never raised any demand to frame any such additional issue. Secondly in the facts of the present case, the parties have gone to trial with full knowledge of all the issues and the discussion of the issues in the Judgment shows that with full consciousness to this effect, the evidence has been led and while considering the question of partition the trial court has observed as under:-

"In these circumstances I have no alternative but to arrive at a conclusion that the suit properties are the ancestral properties of the parties to the suit and as such they are joint Hindu family properties and the defts are the members of their joint Hindu family and thus the plff is entitled to the declaration that he is the joint owner of the suit properties and is entitled to joint possession and joint user of the same with the defts and other members of their joint Hindu family. Unless it is satisfactorily proved by the defts that there was a partition of the properties of their joint Hindu family and the suit properties have gone to their share."

11. In this view of the matter, I do not find any reason to remand the matter, merely because no separate issue had been struck on the question of partition and this objection, as was raised in the written statement, was dealt with as a part and parcel of the other issues, to which the parties have gone into trial.

12. So far as the suit properties were concerned, there is no dispute that they are joint Hindu family properties inasmuch as it is the admitted position between the parties that the suit lands were purchased by deceased Mangalbhai i.e. father of the plaintiff and defendants Nos.1 and 2 under provisions of S.32G of the Bombay Tenancy and Agricultural Lands Act, there was a Farm house in land bearing S.No.285/2 since the life time of the grandfather of the plaintiff and defendants Nos.1 and 2, which was repaired by their father Mangalbhai, that the plaintiff was staying in the house on the land bearing S.No.285/2, originally the properties were running in the name of Mangalbhai i.e. father of the plaintiff and the defendants Nos.1 and 2 and even now they are in the joint names of all the parties to the suit and the sisters of the plaintiff and defendants Nos.1 and 2 and on the date of the Suit, the defendants were cultivating the suit land and they were residing in the house situated on the land bearing S.No.285/2. It

is, therefore, clear that the suit properties are undivided properties belonging to the parties to the Suit and all the parties to the Suit are the members of joint Hindu family. Even the Village Form Nos.7/12 in respect of the suit land indicates that the suit properties were still in the joint names of all the members of this joint Hindu family including the parties to the Suit and the sisters of the plaintiff and the defendants Nos.1 and 2 after the death of Mangalbhai. There is no plea that any of these properties was self acquired by any of the parties to the Suit and it is also not in dispute that Mangalbhai had died in the year 1977 intestate. It is also established in the facts of the present case that actual partition of these properties had never taken place as the living of one of the members of the joint Hindu family separately does not mean that partition had taken place. Parting away of one of the members from the family is different than the partition of the property and, therefore, for the purpose of the share as a member of the Hindu joint family in the property of such joint family, a member continues to hold his status as such even though he has started living separately and he is entitled to get such declaration as has been granted in the instant case. It may be pointed out that the Civil Suit No.115/72 was in relation to the lands of S.Nos.295, 294 and 204.The Suit had been filed by the father of the plaintiff and defendants Nos.1 and 2 against the plaintiff and the instruments of transfer as was claimed by the plaintiff was sought to be set aside. That Suit so filed by the father was decreed against the plaintiff and the same has already attained finality against the respondent plaintiff, meaning thereby that those properties continue to be the properties of the joint Hindu family and do not belong to the respondent plaintiff. This also shows that there had never been any partition. On the contrary, it shows that that judgment has attained finality against the present respondent plaintiff, that he has no exclusive claim over those lands and they also form part of the joint Hindu family property in which all the parties may claim their share in accordance with law. The argument raised on the basis of the proceedings in this Civil Suit No.115/72 that it goes to show that partition had taken place also, therefore, fail.

13. Whereas it is settled that a suit with regard to declaration claiming joint ownership, possession and joint user may be maintainable, even if it is not coupled with the prayer for partition, the ground raised on behalf of the appellants against the maintainability of the Suit also fails.As a matter of fact, it appears that

the plaintiff - respondent was not properly advised at the time when the Suit was filed and the prayer in the Suit was kept confined to the declaration as above and the prayer with regard to partition was not made. However, that does not mean that the Suit for declaration does not remain maintainable. It is unfortunate that having kept the prayer of the present Suit confined to the declaration as above, the respondent - plaintiff may have to undergo another litigation for actual partition for his actual defined share in the joint Hindu family property and the partition thereof by meets and bounds.

14. In the trial, a issue had also been struck as to whether the Suit was bad for non joinder of the sisters as a party. The same has been dealt with by the trial court in para 12 and I agree with the finding of the trial court that the plaintiff never wanted his share to be determined in the present Suit by meets and bounds and since it was not a Suit for actual partition and was only with regard to the declaration of his being a member of the joint Hindu family, it was not necessary to implead the sisters as a party and they could not be said to be necessary parties so as to warrant the dismissal of the Suit. The objection was also taken by saying that the Suit was time barred. The trial court has considered in para 13 that the defendants had started obstructing his entry in the suit lands in June 1980 and the Suit was filed on 1.3.82 and, therefore, it was within time. The defendants have also not been able to show as to how the Suit can be said to be time barred and they failed to show it either in the evidence or in the argument and, therefore, the Suit could not be dismissed on this ground also.

15. I do not find any infirmity in the impugned judgment and decree passed by the trial Court. This Appeal has no substance. The same is hereby dismissed with costs.

16. Since the main Appeal itself has been dismissed, the interim order dt.1.7.94 passed in Civil Application No.2561/94 stands automatically vacated. This Civil Application is hereby dismissed. Rule is discharged.

17. Whereas the learned counsel for the applicant does not press the Application for stay as the Appeal itself has been dismissed, this Civil Application No.10001/99 is hereby dismissed.